No. 15-290

# In The

# Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

*Petitioner,*

*v.*

HAWKES CO., INC., ET AL.,

*Respondents.*

On Writ of Certiorari To
The United States Court Of Appeals
For the Eighth Circuit

## BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS AND NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF *RESPONDENTS*


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## INTEREST OF *AMICI CURIAE*[1]

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 750 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they construct approximately 80% of all homes in the United States.

NAHB has been involved with litigation concerning whether Clean Water Act jurisdictional determinations are reviewable under the Administrative Procedure Act. In addition, as a representative of land developers, NAHB brings considerable expertise to the issue before the Court.

The National Association of Realtors® ("NAR") is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,300 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

A large part of building and selling homes consists of obtaining and preparing the land for construction[2]. That land often contains "waters of the United States," as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often land developers must alter those "waters" to ensure that their community makes the best use of the land in accordance with local and state zoning and land use requirements.

Unfortunately, property owners cannot simply look at their property to determine the presence and boundaries of "waters of the United States." They must hire consultants (i.e. engineers, scientists, and regulatory and compliance specialists) who assist the developers with the permitting process. Those specialists will often develop a "jurisdictional

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[2] NAHB estimates that the cost of the "finished" lot averages 19 percent of the sales price of a home. Heather Taylor, *Cost of Constructing A Home*, Special Studies (Jan. 2, 2014), http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=221388&channelID=311 (last visited Feb. 16, 2016).

determination" and submit it to the U.S. Corps of Engineers ("Corps") for approval. It is common for the developer's consultants and the Corps to disagree on the Corps's jurisdiction. The extent to which the Corps asserts jurisdiction over a project will directly impact whether and how the development proceeds, and sometimes results in a community not being built.

Furthermore, jurisdictional determinations affect property owners, builders and real estate brokers involved in sales of property that contain jurisdictional waters. The presence of jurisdictional "waters" has a well-recognized impact on the value of property And a number of states require the disclosure of the presence of jurisdictional waters to subsequent buyers. In such states, failure to make the required disclosures can lead to liability for misrepresentation, breach of contract, or even fraud, as well as corresponding liability for damages or other remedies being imposed.

Thus, the Court's decision in this matter will have an appreciable impact on NAHB's and NAR's members.

## SUMMARY OF ARGUMENT

The Administrative Procedure Act's ("APA") judicial review provisions must be given a "hospitable" interpretation. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967). Petitioner, however, attempts to constrain APA judicial review. and fails to explain why the Court should disregard Corps regulations and guidance, which clearly show that Clean Water Act ("CWA") "approved jurisdictional determinations" are reviewable under the APA. 33 C.F.R. § 331.2.

Furthermore, when the federal government makes a final determination that it has jurisdiction over property pursuant to the CWA the impact on the property owner extends far beyond the Corps's permitting process. The Petitioner fails to recognize many of the rights impacted, obligations affected, and legal consequences that flow from approved jurisdictional determinations.

## ARGUMENT

### I. THE APA'S JUDICIAL REVIEW SECTION MUST NOT BE CONSTRAINED.

The Administrative Procedure Act ("APA") provides for judicial review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. The Court has established that an agency action is a "final agency action" if it 1) "mark[s] the consummation of the agency's decision making process," and 2) is an action "by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations omitted).

Congress enacted the APA to address a wide range of agency activities. "The legislative material elucidating [the APA] manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation." Furthermore, "the Court [has] held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-141 (1967) (internal citations and footnotes omitted) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)); *See also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (providing that "the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention

to preclude review."). "A restrictive interpretation of § 704 would unquestionably, in the words of Justice Black, 'run counter to § 10 and § 12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes .." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)).

As evidence of the APA's "generous review provisions" the *Bennett* court specifically used the word "or" within the second prong. "Or" is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *United States v. Woods*, 134 S. Ct. 557, 567 (2013) (internal quotations omitted). Thus, an agency action can satisfy *Bennett's* second prong in any one of three distinct ways. It can determine "rights," it can determine "obligations," or it can be an action from which "legal consequences will flow." Each of these must have "separate meanings." *Id.*

The Petitioner correctly concludes that a jurisdictional determination[3] marks the consummation of its decision making process, thereby satisfying *Bennett's* first prong. Brief for the Petitioner, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, No. 15-290, 2016 WL 322596 (2016) ("Pet'rs Br.") at 25-26. It, however, attempts to limit *Bennett's* second prong, thereby incorrectly

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[3] Unless preceded by "preliminary," when Amici refer to a jurisdictional determination it means an approved jurisdictional determination. *See* 33 C.F.R. § 331.2.

concluding that the APA precludes review of jurisdictional determinations.

Petitioner adds obstacles to *Bennett's* second prong throughout its brief by stating that an action must determine "legal rights," effect "legal obligations" or "impose legal consequences." Pet'rs Br. at 17, 24, 25, 26, 34, 35. These are not the words used in *Bennett*. A legal consequence can flow from an agency action, like a chain of causation, without that action necessarily "imposing" said consequence. Similarly, not all obligations are necessarily "legal" obligations. *Cf. Cincinnati Soap Co. v. United States*, 301 U.S. 308, 314 (1937) (explaining that the United States had a "moral obligation to protect, defend, and provide for the general welfare of, the inhabitants" of the Philippine Islands.); *Roberts v. United States*, 445 U.S. 552, 557-58, (1980) (discussing the "social obligation" to report crime). By improperly adding the limiting words "legal" to "rights" and to "obligations," and "impose" before "legal consequences" the government attempts to "defeat the [APA's] central purpose of providing a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

Accordingly, the Court must reject Petitioner's efforts to restrict judicial review under the APA and should acknowledge that agency action is reviewable unless it is clear that Congress intended otherwise.

## II. REGULATIONS, POLICIES, AND COURT DECISIONS ESTABLISH THAT CWA JURISDICTIONAL DETERMINATIONS ARE REVIEWABLE.

The Corps's regulations and policies, combined with Court of Appeals decisions under the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 et seq. ("RHA"), demonstrate that CWA jurisdictional determinations are reviewable under the APA.

### A. The Corps's Regulations and Policies Support Review.

The Corps's own regulation provides that jurisdictional determinations are "Corps final agency action." 33 C.F.R. § 320.1(a)(6). This regulation was adopted in 1986, well after the enactment of the APA. Its purpose was to codify the existing practice of ensuring that when the Corps conducts a jurisdictional determination the "public can rely on that determination." Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206-01 (1986).

Similarly, Corps guidance provides confirmation of the agency's regulatory position. In June 2008, the Corps issued Regulatory Guidance Letter, U.S. Army Corps of Eng'rs (June 26, 2008) No. 08-02[4], on the subject of jurisdictional determinations (hereinafter "RGL 08-02"). In RGL 08-02, the agency

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[4] *Available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf (last visited February 10, 2016).

addresses the differences between "preliminary" jurisdictional determinations and "approved" jurisdictional determinations. The Corps describes preliminary determinations as non-binding, but describes an *approved* jurisdictional determination as "an *official Corps determination* that jurisdictional 'waters of the United States,' or 'navigable waters of the United States,' or both, are either present or absent on a particular site." RGL 08-02 at 1 (emphasis added). The agency's own description of an approved determination is thus a far cry from "additional information that [a] landowner may find useful .," or the "agency's non-binding view." Pet'rs Br. at 16, 18, 41.

Furthermore, RGL 08-02 highlights the rights, obligations, and legal consequences that stem from an approved jurisdictional determination:

> An approved JD:
>
> (1) constitutes the Corps' official, written representation that the JD's findings are correct;
>
> (2) *can be relied upon by a landowner, permit applicant, or other "affected party" (as defined at 33 C.F.R. 331.2) who receives an approved JD for five years* (subject to certain limited exceptions explained in RGL 05-02);
>
> (3) *can be used and relied on by the recipient of the approved JD* (absent extraordinary circumstances, such as

> an approved JD based on incorrect data provided by a landowner or consultant) if a CWA citizen's lawsuit is brought in the Federal Courts against the landowner or other "affected party," challenging the legitimacy of that JD or its determinations; and
>
> (4) can be immediately appealed through the Corps' administrative appeal process set out at 33 CFR Part 331.

RGL 08-02 at 2 (emphasis added). Legal consequences certainly flow to a landowner that holds a jurisdictional determination when that landowner can rely on it for five years as against the Corps and EPA, and can use it to defend against a CWA citizen suit.

Furthermore, RGL 08-02 demonstrates that jurisdictional determinations obligate the Corps. In *Bennett*, the Court presented the second prong of the final agency action test in the passive voice. *Bennett*, 520 U.S. at 178. Therefore, it is not necessary for the agency action to determine the rights or obligations of the regulated party, nor must it cause legal consequences to flow to the regulated party. The agency action at issue may obligate the action agency or it may cause legal consequence to flow back to the agency

The Court of Appeals for the District of Columbia Circuit has recognized this point. For example, in *General Elec. Co. v. E.P.A.*, 290 F.3d 377 (D.C. Cir.

2002), plaintiffs challenged an EPA guidance document claiming that (among other things) the Agency had not properly promulgated it under the APA. The court explained, "it is clear that the Guidance Document is final agency action because it marks the consummation of the EPA's decisionmaking process and it determines the rights and obligations of both applicants and *the Agency*." *Id.* at 380 (emphasis added).

Similarly, in *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) plaintiffs brought an APA challenge against EPA's "VHS model." Holding that the model was judicially reviewable, the D.C. Circuit explained "If a statement denies the decisionmaker discretion in the area of its coverage, so that he, she or they will automatically decline to entertain challenges to the statement's position, then the statement is binding, and creates rights or obligations .." *Id.* at 1320.

Therefore, (putting aside the Corps's litigating position), 33 C.F.R. § 320.1(a)(6) combined with RGL 08-02 demonstrate that when the Corps develops a jurisdictional determination the Agency binds *itself* for five years with respect to the precise identification of the limits of jurisdictional waters on a project site. RGL 08-02 at 1. Thus, if a landowner with a jurisdictional determination seeks a permit, the Corps does not revisit that determination. This no doubt "creates rights or obligations." *McLouth*, 838 F.2d at 1320.

### B. Rivers and Harbors Act Jurisdictional Determinations are Judicially Reviewable.

Both the Corps's rule which explains that jurisdictional determinations are "final agency action," 33 C.F.R. § 320.1(a)(6), and its definition of "jurisdictional determination," 33 C.F.R. § 331.2, apply equally to the CWA and the Rivers and Harbors Act of 1899, 33. U.S.C. § 401 et seq. ("RHA"). Likewise, RGL 08-02 provides that "[a]pproved jurisdictional determinations (JDs) and preliminary JDs are tools used by the U.S. Army Corps of Engineers (Corps) to help implement Section 404 of the Clean Water Act (CWA) and Sections 9 and 10 of the Rivers and Harbors Act of 1899." RGL 08-02 at 1.

The RHA, similar to the CWA, "requires that a permit be obtained from ... the Army Corps of Engineers, for any activity which takes place in navigable waters of the United States, or which affects the navigable capacity of such waters." *Swanson v. United States*, 789 F.2d 1368, 1371 (9th Cir. 1986)[5]; *see Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 179 (2001) (recognizing the similarities between the CWA and RHA). Also similar to the CWA, the jurisdiction of the RHA is limited to "navigable waters of the United States," 33 U.S.C. §§ 401, 407, defined as "those waters that are subject to the ebb

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[5] The Corp's Rivers and Harbors Act regulations require a permit "for structures and/or work in or affecting navigable waters of the United States .." 33 C.F.R. § 322.3 (2015).

and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2015). Thus, as with the CWA, the statutory text of the RHA establishes the limits of the Act, and the Corps developed a regulation interpreting that limit.

In contrast to the CWA, however, many courts have reviewed jurisdictional determinations made pursuant to the RHA. For example, in *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630 (11th Cir. 1995), property owners along Fisheating Creek erected fences, felled trees, and posted "no trespassing" signs to keep the public from using the Creek. Subsequently, the Corps prepared a report, finding that Fisheating Creek was a "navigable water of the United States" under the RHA. Lykes Brothers "brought a civil action pursuant to 5 U.S.C. § 704 against the [Corps] seeking to review and set aside the [agency's] determination that Fisheating Creek ... is a navigable water of the United States .... " *Id.* at 633 (emphasis added). Thus, the Lykes Brothers invoked the APA to obtain judicial review over the Corps's action. The trial court concluded that Fisheating Creek was *not* a "navigable water of the United States." *Lykes Bros., Inc v. U.S. Army Corps of Eng'rs,* 821 F. Supp 1457, 1458 (M.D. Fla. 1993). On appeal, the Eleventh Circuit reviewed the factual findings and found no error in the trial court's decision. Thus, the *merits* of the Corps's RHA jurisdictional determination were tried and appealed – all without raising the question of whether the Corps's jurisdictional determination was final agency action. *See also United States v.*

*C.E. Harrell*, 926 F.2d 1036 (11th Cir. 1991) (reaching the merits and overturning Corps's determination that Lewis Creek was a navigable water of the United States, even though no permits had been sought to use the waterbody and without any question of whether the agency's action was final).

Similarly, in *Loving v. Alexander*, 548 F Supp 1079 (W.D. Va. 1982), *aff'd*, 745 F.2d 861, 863 (4th Cir. 1984) approximately 67 riparian land owners sought a "judgment declaring that the Jackson River is nonnavigable from the mouth of Dunlap Creek to the base of the Gathright Dam ...." *Id.* The district court upheld the Corps's assertion of RHA jurisdiction, found its "determination of navigability is an agency action," and decided that the "plaintiffs stated a cause of action under the Administrative Procedure Act." On appeal, the Fourth Circuit recognized that "navigability is a term that has traditionally been defined by decisions of the federal courts" and affirmed the district court's decision. *Loving*, 745 F.2d at 864. *See also Leslie Salt Co. v Froehlke*, 578 F.2d 742, 747 (9th Cir. 1978) (reaching the question of Corps's jurisdiction even though the suit "did not involve action or inaction by the Corps on any particular application by [the plaintiff] for a permit under the Rivers and Harbors Act or the [CWA]," because the plaintiff refused to apply for a permit); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 620 (8th Cir. 1979) (Court reviewed the Corps's "Determination of Navigability" developed pursuant to the RHA even though no permit or authorization had been sought.); *Miami Valley Conservancy Dist. v.*

*Alexander*, 692 F.2d 447, 451 (6th Cir. 1982) (holding that tributaries of Miami River did not fall under the jurisdiction of the RHA in a declaratory judgment case).

Hence, the Courts of Appeals have had little trouble reviewing the Corps's jurisdictional determinations made pursuant to the RHA. The Petitioner, however, offers no justification why jurisdictional determinations made under the CWA should not similarly be subject to APA judicial review.

## III. A CWA JURISDICTIONAL DETERMINATION HAS MANY CONSEQUENCES BEYOND THE CORPS'S PERMIT PROCESS.

The Petitioner incorrectly concludes that a CWA jurisdictional determination is just "additional information that the landowner may find useful in choosing between" obtaining a CWA permit, or discharging pollutants without a permit. Pet'rs Br. at 16, 21. That view is not grounded in practical business reality. There are many instances in which a jurisdictional determination affects the rights or obligations of a property owner aside from the section 404 permitting process or agency-initiated enforcement.

### A. The Value of Real Property is Impacted by a Jurisdictional Determination.

An essential ingredient in calculating the market value of real property is the "highest and best use" for which the property may be utilized. Without a doubt, the presence of federally designated wetlands

on a parcel of property can constrain its use and considerably impact its value. Donald T. Morrison, *Highest and Best Use of Property Taken Under Eminent Domain,* 19 Am. Jur. Proof of Facts 3d 613 § 5 (West, Westlaw Feb. 2016) (1993). As commented by a land appraisal expert, a "reasonably prudent and knowledgeable buyer would be 'crazy' not to investigate for the presence of jurisdictional wetlands." *Dept. of Transp. v. La Salle Nat'l Bank*, 251 Ill. App.3d 901, 915 (1993). Due to the potentially disastrous financial and legal consequences flowing from a jurisdictional determination, securing an "official Corps determination that jurisdictional waters...are either present or absent on a particular site" has become routine in real property business transactions. RGL 08-02, at 1.

Consider, for example, a small land developer who holds an option contract to purchase unimproved property. As part of a due diligence investigation the developer will want to determine if the property contains CWA "navigable waters." A jurisdictional determination request form is prepared[6] and submitted to the local Corps district office. The Corps responds with an approved jurisdictional determination reporting the presence of several

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[6] The Corp recognizes that requests for jurisdictional determinations may accompany a permit application or be made independent of a permit application, such as where a "landowner [needs] a JD to allow or facilitate the sale of his or her land." Regulatory Guidance Letter, U.S. Army Corps of Eng'rs, (June 5, 2007) No. 07-01, *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-01.pdf at 4 (hereinafter "RGL 07-01").

jurisdictional wetlands along with a map identifying their precise locations.

If the wetlands consume the property line which is coincident with the edge of the public roadway, access to the property may be severely restricted. If the wetlands pock-mark the property the buildable envelope may be reduced or entirely eliminated. The developer must also consider whether permit authorization to alter the wetlands can be secured, the time and expense of securing such authorizations (including avoidance, minimization and mitigation costs) [7], and whether any judgment liens or enforcement actions involving the wetlands encumber the property. Margaret N. Strand, *Wetlands: Avoiding the Swamp Monster*, in *Environmental Aspects of Real Estate Transactions, in* Brownfields to Green Buildings 720, 721 (James B. Witkin 2d ed., 1999); *See* NAHB Land Development Checklist, https://www.nahb.org/en/ research/~/media/887C0A886D0644248ECBAAF501CE18B0.ashx; *See* Randall S. Guttery, Stephen L. Poe & C.F Sirmans, *An Empirical Investigation of Federal Wetlands Regulation and Flood Delineation: Implications for Residential Property Owners*, 26 J. Real Estate Research, No. 3, 303 (2004). Each of these considerations flow from a jurisdictional determination and may profoundly

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[7] *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915 – not counting costs of mitigation or design changes").

impact a property's market value. *See* Randall S. Guttery, Stephen L. Poe and C.F. Sirmans, *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners,* 37 Am. Business Law J. 2, 340 (2000) (sale price of residential properties located in areas likely to be delineated as jurisdictional wetlands fell by 10.5 percent, relative to unregulated properties). *See* Katherine A. Kiel, *Environmental Regulations and the Housing Market: A Review of the Literature in* 8 Cityscape: A Journal of Policy Development and Research, No. 1, 195 (2005) (presence of jurisdictional wetlands will decrease the value of land due to uncertainty over whether fill permits will be granted).

Similarly, a lender will always want to assess the value of real property before advancing funds for property acquisition. As an executive for the Maryland Bankers Association remarked on loans secured by unimproved property, "Unless we have a reason to know that it is or isn't a wetland, we just don't know the value of it." William Bunkley and Charles P Edmunds, *Appraising Wetlands*, Appraisal Journal (1992) (quoting John Bowers, Jr. Executive Vice President, Maryland Bankers Association). A jurisdictional determination will be considered alongside any private restrictions, zoning, building codes, historic district controls and other environmental regulations to reach a reasonable market value opinion. In addition, a jurisdictional determination will trigger a marked increase in the amount of site feasibility documentation required by a lender for loan approval. This will directly affect the borrower's

investment and development choices by increasing the length of time required to secure loan approval, the types of outside consultants needed to produce necessary documentation, and the costs associated with both. D. Linda Kone, *Land Development,* 50-51 (Home Builder Press, National Association of Home Builders, 1994).

Perhaps the most telling examples of rights being determined and legal consequences flowing from a jurisdictional determination arise in the context of land condemnation proceedings. The just compensation constitutionally required in condemnation cases is the fair cash market value of the condemned property when put to its highest and best use. *U.S. v. Twin City Power Co.*, 350 U.S. 222, 235-236 (1956); *U.S. ex rel. and for Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 275-276 (1943); 4 Julius L. Sackman, *Nichol's The Law of Eminent Domain* (Rev. 3d ed. 1990) § 12 B.12, pp. 89-133. When determining market value it is proper to consider all physical, legal and government restrictions delimiting the availability of property for a proposed use. This calculus necessarily includes the presence of regulable wetlands, as identified through a Corps jurisdictional determination.

In *Normandy Corp. v. S.C. Dept. of Transp.*, 386 S.C. 393, 688 S.E. 2d 136 (S.C. Ct. App. 2009), *cert. denied* (Mar. 2, 2011), the South Carolina Department of Transportation ("DOT") brought a condemnation action to acquire six acres of private property for the construction of a parkway. The DOT argued that just compensation for the property

should be calculated using a 1997 jurisdictional determination representing the Corps' "final word" that 50% to 75% of the property was comprised of jurisdictional wetlands. *Normandy Corp.* 399-400, 406-407 The property owner countered that DOT's appraisal severely undervalued its condemned parcel because the jurisdictional determination predated the condemnation date by three years. The state appeals court agreed with the property owner. It found that "because the amount of jurisdictional wetlands existing on a tract of land has a significant impact on the value of that tract, evidence regarding jurisdictional wetland amounts [as of the condemnation date] is relevant and material to fixing just compensation." *Normandy Corp.* at 407 Thus, legal consequences clearly emanate from the issuance of a jurisdictional determination.

Similarly, *U.S.A. v. 48.86 Acres of Land, More or Less*, 2001 WL 474410 (E.D. Pa. April 30, 2001) involved a 1989 condemnation action concerning the valuation of the landowner's property. To establish current market value the landowner's expert certified that the "highest and best use" of the property was commercial development. The United States challenged the landowner's appraisal evidence as flawed for failure to analyze the impact of Corps designated jurisdictional wetlands on such development plans, contending that the presence of jurisdictional wetlands will have "a major impact on the value of the property." *Id.* at 2. The district court agreed with the United States. Based on the legal relevance of a jurisdictional determination, the court issued an Order authorizing federal entry onto

Defendants' land to conduct a determination. *48.86 Acres of Land*[8]; *See also Dept. of Transp. v. LaSalle Nat'l Bank*, 251 Ill.App.3d 901 (1993) (illustrating how a Corps jurisdictional determination is used by courts in determining the value of real property).

Thus, in *48.86 Acres of Land*, the government recognized the impact of a jurisdictional determination on the value of real property, while here it claims it is just an informational tool. Pet'rs Br. at 16. The government cannot have it both ways.

### B. Some States Require Real Property Owners to Disclose The Presence of Wetlands to Buyers.

Recognizing the potentially devastating impact jurisdictional wetlands may have on real property values, a number of state now impose strict wetland disclosure obligations on sellers of residential real property. Failure to disclose the presence of wetlands, as identified through a jurisdictional

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[8] This case also illustrates that landowners do not always request jurisdictional determinations. While in *U.S.A. v. 48.86 Acres of Land* the court ordered the determination, in some cases the Corps will conduct the jurisdictional determination on its own. *See* Brief of *Amicus Curiae* the National Association of Home Builders in Support of Petitioner, *United States Army Corps of Eng'rs v. Hawkes Co., Inc*, No. 15-290 (filed Oct. 6, 2015) (explaining that in Arizona the Corps issued a jurisdictional determination on its own that affected thousands of square miles of property, did not notify any of the affect property owners, and still claimed that the determination was not an APA final agency action.)

determination; can carry significant legal consequences.

For example, in the state of Louisiana, all known real property defects must be disclosed prior to a sale. LA R.S. 9:3195-3199. The Louisiana Real Estate Commission, a state government regulatory agency, has identified defects that may have a "substantial adverse affect on the value of property" and produced them in the Louisiana Residential Property Disclosure form. LA R.S. 9:3198(A)(1); Informational Statement for Louisiana Residential Property Disclosure Form[9], revised Feb. 1, 2015. The mandatory form requires seller to disclose whether "any part of the property [has] been determined a wetland by the United States Army Corps of Engineers under § 404 of the Clean Water Act," to attach a copy of the jurisdictional determination, and to provide notice that additional costs for a § 404 permit may result. Property Disclosure Document for Residential Real Property, revised Feb. 1, 2015. App. 1a.

Historically, New York state home sellers had no duty to disclose the presence of property defects prior to a transfer. In 2002, the state legislature created exceptions to the general rule of "caveat emptor" through passage of the Property Condition Disclosure Act. NY Real Prop. Law §§ 460-467 The Act requires every seller of residential real property complete a property condition disclosure statement,

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[9] *Available at* http://www.lrec.state.la.us/pdf_files/forms/Residential-Property-Disclosure-Legal.pdf (last visited 02.29.16)

or pay a credit of $500 to the purchaser at closing. *Id.* at §462. One of the questions on the disclosure statement is whether any part of the property contains a "designated wetland." If so, the seller must provide details about the wetland to the buyer. NYS Dept. of State Division of Licensing and Services (Rev. 8/06), *available at* https://www.dos.ny.gov/forms/licensing/1614-a.pdf at 2.

In Hawaii, the seller is required to provide a purchaser with a disclosure statement that fully and accurately exposes all known or reasonably discoverable "material fact[s]" relating to the property. Haw. Rev. Stat. Ann. § 508D-1. "Material fact[s]" are defined as "any fact, defect, or condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential property being offered for sale." *Id.* Because a Corps wetland determination measurably impacts the value of property, such determination would need to be disclosed to all prospective purchasers. *See also*, R.I. Gen. Laws § 5-20.8-2(a) & (b)(2)(xxviii) (requiring disclosure of all "material facts" regarding the property, including the location of coastal wetlands, fresh water wetlands, marshes or swamps that many impact future development). The seller of residential real property in Oregon faces a similar duty to disclose "any governmental studies, designations, zoning overlays, surveys or notices that would affect the property." Or. Rev. Stat. § 105.464. Finally, the Wisconsin Code includes a report form entitled Real Estate Condition Report Disclaimer. Wis. Stat. § 709.03.

Part C.11 of the report requires disclosure of all "floodplain, wetland or shoreland zoning area[s]. *Id.*

While the above described wetland disclosure obligations will place the prospective purchaser in a more informed position regarding pitfalls associated with the property, they also have the effect of commanding the property owner to affirmatively disclose the presence of regulated wetlands. Failure to do so may trigger legal consequences sounding in breach of contract, fraudulent concealment, and negligent misrepresentation.

### C. Housing Grant and Assistance Programs are Affected by Jurisdictional Determinations.

The U.S. Department of Housing and Urban Development ("HUD") administers a number of housing grant and financial assistance programs that involve Amici's members. HUD's programs are designed to provide states, municipalities, and communities with the resources they need to provide housing and community development projects that benefit low-income individuals and at-risk communities.

Projects receiving HUD financial assistance must undergo an environmental review process, which varies depending on the scope and circumstances of the project[10] However, for all projects involving new construction or the expansion of an existing building

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[10] *Available at* www.hudexchange.info/programs/environmental-review/ (last visited March 1, 2016)

footprint, HUD or its grantees must determine whether there are wetlands on the project site, or if there are off-site wetlands that may be impacted by the development of the site[11] HUD's regulations provide that "wetlands" include (among others) wetlands "subject to section 404 of the Clean Water Act," 24 C.F.R. § 55.2(b)(11), and require project proponents to avoid impacts to wetlands. 24 C.F.R §§ 55.1(a)(2), 55.11(b).

Thus, if a developer receiving HUD financial assistance holds an approved jurisdictional determination that indicates wetlands on the property, and i) plans to take an action in the wetland that does not require a Corps permit, or ii) plans to obtain a Corps general permit, HUD's regulations mandate that the landowner complete an 8-step process to determine that there are no practicable alternatives to wetlands development. 24 C.F.R. § 55.20. This 8-step process requires the proponent to publish public notices and accept public comment; identify and evaluate practicable alternatives to the proposed site; and identify and evaluate potential direct and indirect impacts to wetlands and means, such as compensatory mitigation, that restore or preserve a wetland's natural beneficial functions. At the end of the process, the proponent must re-evaluate the proposed project in light of the information gleaned through the above-described process, and determine whether no practicable alternative to impacting a

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[11] *Available at* www.hudexchange.info/programs/environmental-review/wetlands-protection/ (last visited March 1, 2016)

wetland exists. If the agency determines that there are no practicable alternatives, it may pursue the original project only after another public notice and opportunity for public comment is published. *Id.*

HUD's wetlands protection requirements apply, regardless of whether the proponent ultimately obtains a permit to fill the on-site wetlands. Thus, compliance with HUD's 8-step regulatory process flows from the presence of an approved jurisdictional determination.

### D. The Recipient of a Jurisdictional Determination is Subject to Additional Penalties.

Petitioner repeatedly claims that the recipient of an approved Corps jurisdictional determination is not exposed to additional penalties if a CWA violation is later identified. *See* Pet'rs Br. at 10, 16-17, 20, 22-23, 24, 26, 29-32. In support of that position Petitioner attempts to blur the distinction between preliminary jurisdictional determinations, written indications that there "may be" jurisdictional waters and which are "advisory in nature," and approved jurisdictional determinations, a definitive, official determination that there *are*, or that there *are not*, jurisdictional waters on a site. 33 C.F.R. § 331.2; RGL 08-02, 1, 3 (emphasis added). Petitioner labels an approved jurisdictional determination an innocuous information tool not dissimilar from informal agency guidance or opinion letters. Pet'rs Br. at 16-17, 33. In reality, an approved jurisdictional determination carries the legal effect necessary for final agency action because it affects

federal administrative and judicial enforcement actions and the extent of penalties available.

### 1. Jurisdictional Determinations Impact the Amount of Civil Penalties Courts Consider.

Section 309(b) of the CWA authorizes the Administrator to initiate civil actions in federal court seeking injunctive relief as well as civil penalties[12]. 33 U.S.C. 1319(b). Section 309(d) of the CWA provides that "[i]n determining the amount of a civil penalty the court shall consider" the following six factors: "*the seriousness of the violation or violations*, the economic benefit (if any) resulting from the violation, any history of such violations, any *good-faith efforts to comply* with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. § 1319(d) [13] (emphasis added).

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[12] The maximum penalty for civil violations occurring after Dec. 6, 2013, is $37,500 per day for each violation. 33 U.S.C § 1319(d); 40 C.F.R. § 19.4 (2013).

[13] When a federal judicial enforcement action seeking civil penalties is filed, the United States' general practice is not to request a specific proposed penalty. Rather, a request for penalties "up to" the CWA statutory maximum is typically recited. Memorandum from Sylvia Lowrance, Acting Asst. Adm'r, EPA OECA, to Waters Prot./Mgmt. Div. of Dir. et al., Issuance of Revised CWA Section 404 Settlement Penalty Policy (Dec. 21, 2001) at 7, *available at* http:// www.epa.gov/ sites/production/files/documents/404pen.pdf. (last visited March 1, 2016)

If Hawkes had disobeyed the findings of the Corps's Dec. 31, 2012 revised approved jurisdictional determination, Pet'rs App. 44a-102a (hereinafter "Dec. 31 Jurisdictional Determination"), and commenced peat mining without the necessary CWA permits a reviewing court would certainly take into consideration the information detailed in the Dec. 31 Jurisdictional Determination before calculating a penalty. The extent of wetlands and their "exceptional quality" would speak to the seriousness of the violation. Pet'rs App. 64a; *see Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F Supp. 1368, 1383 (D. Haw. 1993) (looking at the significance of the CWA violation and the actual or potential harm to human health and the environment when assessing a civil penalty); *United States v. Avatar Holdings, Inc.*, No. 93-281-CIV-FTM-21, 1996 WL 479533, at 6 (M.D. Fla. Aug. 20, 1996) (finding the seriousness of a violation is determined by considering "the number, duration and degree of the violations as well as the actual or potential harm to human health and the environment"); *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp.2d 41, 49-50 (N.D. N.Y. 2003) (noting that courts should consider the severity of the violations and their effect on the environment when calculating penalties under the CWA).

Likewise, Hawkes's good-faith efforts to comply with the law would be brought into question because Hawkes received not one, but three jurisdictional

determinations[14] Each of those jurisdictional determinations reported, albeit under different theories, that "There are 'waters of the U.S.' within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area." *See e.g.* Dec. 31 Jurisdictional Determination at App. 50a. Evidence of good-faith efforts would include whether the defendant should have known that its conduct might be prohibited and whether the findings of the jurisdictional determination were ignored.

In *United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1991), *cert. denied*, 531 U.S. 813, 121 (2000), the court refused to find any good-faith efforts at CWA compliance because the defendants demonstrated little urgency to meet the terms of their existing permit and their discharge violations actually increased over time. *Id.* at 531. The court was also unimpressed with defendants' claim of good-faith by reason of their engagement of compliance consultants. It explained that if a defendant seeks a consultant's expert advice but ignores the advice and fails to implement suggestions, then the defendant has not shown good-faith. *Id.*; *See United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 350-351 (1997). Likewise, if a defendant requests a Corps jurisdictional determination, and later ignores the official findings of that determination, good-faith as an aggravating

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[14] Nov. 8, 2011, U.S. Army Corps of Eng'rs Draft Jurisdictional Determination; Feb.7, 2012 U.S. Army Corps of Eng'rs Approved Jurisdictional Determination at App. 4a; Dec. 31 Jurisdictional Determination at App. 44a.

rather than mitigating factor will be used in fashioning a civil penalty.

### 2. Jurisdictional Determinations Impact the Amount of Administrative Penalties the Agencies Assess.

The large majority of Corps and EPA CWA enforcement actions are brought through civil administrative orders, which command corrective action by a date certain and often impose penalties. 33 U.S.C. § 1319(a) [15]. The agencies must assess administrative penalties after taking into account the factors identified in CWA section 309(g). The factors are: "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the *degree of culpability*, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3) (emphasis added). EPA has incorporated and elaborated on these factors in its "404 Settlement Penalty Policy," (hereinafter, "Penalty Policy") which it uses to calculate appropriate administrative penalties. Memorandum from Sylvia Lowrance, Acting Asst. Adm'r, EPA OECA, to Waters Prot./Mgmt. Div of Dir. et al., Issuance of Revised CWA Section 404

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[15] The CWA prescribes two classes of administrative penalties: Class I for less egregious conduct, which cannot exceed $16,000 per violation or $37,500 in total; and Class II for serious conduct, which are assessed at an amount not to exceed $16,000 per violation but which can be as high as $187,500 in total amount. 33 USC § 1319(g); 40 C.F.R. § 19.4 (2013).

Settlement Penalty Policy (Dec. 21, 2001), *available at* http:// www.epa.gov/sites/production/files/documents/404pen.pdf

When the government's case development "Team"[16] analyzes the "degree of culpability" the "principal criteria" are "*previous experience with or knowledge of the Section 404 regulatory requirements*, the degree of the violator's control over the illegal conduct, and the violator's motivation..." *Id.* at 13 (emphasis added). When assessing the violator's previous experience or knowledge the Team will look to whether "the violator knew or should have known of the need to obtain a Section 404 permit or of the adverse environmental consequences of the discharge prior to proceeding with the discharge activity." *Id.* The Team will assign a gravity value at the high end of the spectrum if there was "previous receipt of a Section 404 authorization or a prior independent opinion of the need for a permit." *Id.*

After calculating the preliminary gravity amount, the Team may adjust the amount up or down based on factors including: (1) recalcitrance (bad-faith); (2) cooperation; (3) inability to pay; (4) litigation consideration; and (5) other case-specific factors. *Id.* at 15-17

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[16] The case development team refers to the Agency 404 technical and legal staff responsible for developing and pursuing a particular administrative or judicial enforcement action.

The Dec. 31 Jurisdictional Determination reported to Hawkes that "there are 'waters of the U.S.' within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area." Pet'rs App. 50a. That same jurisdictional determination reported the presence of a jurisdictional wetland complex of "high vegetative biodiversity... [with] pre-European settlement conditions and ... outstanding statewide biodiversity significance ranking...represent[ing] one of the best examples of ridge and swale communities in Marshall County and northwestern Minnesota...[with a] full suite of functions...include[ing]: vegetative diversity/ integrity, maintenance or characteristic hydrology, flood attenuation, downstream water quality. characteristic wildlife habitat structure, and maintenance of characteristic amphibian habitat." Dec. 31 Jurisdictional Determination at Pet'rs App. 64a -65a.

Thus, by virtue of the Dec. 31 Jurisdictional Determination, Hawkes knew that waters of the United States were present on the property, that 404 permit requirements applied, and that the biological value of the site was significant. Furthermore, Petitioner admits "[a] landowner's receipt of a jurisdictional determination – and its consequent knowledge that the agency believes the CWA applies – could be offered as evidence of the owner's knowledge of the CWA's applicability" Pet'rs Br. at 32.

Yet, Petitioner claims that Hawkes would not expose itself to increased judicial or administrative penalties if, with all of this knowledge, it thumbed

its nose at the Corps and willfully destroyed the high value wetlands on the site. Pet'rs Br. at 17

Petitioner's claim is implausible and the facts illustrate the legal consequences that flow from jurisdictional determinations.

### E. Jurisdictional Determinations Control Where Landowners Have a Right to Proceed.

Finally, consider a development project that contains "waters of the United States." 33 CFR § 328.3(a). However, consider it from the position of the upland instead of from the jurisdictional water. When the Corps conducts a jurisdictional determination it does not simply determine if the property does or does not contain "waters of the United States." It "precisely identifies the limits of those waters on the project site determined to be jurisdictional .." RGL 08-02, at 1. Thus, the Corps literally stakes the bounds of the jurisdictional waters. Within those bounds, the landowner may not add a pollutant without either a Corps or EPA permit[17]

Outside the bounds of the jurisdictional determination, however, the property owner has (with respect to the CWA) the *right* to use the property how he or she sees fit. *See United States v.*

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[17] If the pollutant is "dredge or fill material" then the landowner obtains a permit from the Corps under 33 U.S.C. § 1344. If the pollutant is not dredge or fill material, then EPA must issue a permit under 33 U.S.C. § 1342.

*Craft*, 535 U.S. 274, 279 (2002) (explaining that each of the three types of concurrent ownership provides the owner with the right to use the property); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945)"). In other words, a jurisdictional determination does not only explain where the CWA applies, it explains precisely where it does not apply.

This illustrates the error with the Petitioners' assertion that a person who believes there exist "waters of the United States" on his or her property may either seek a permit, or alternatively proceed without a permit if "it believes that the relevant site does not contain 'waters of the United States.'" Pet'rs Br. at 21. There exists a third option where many of Amici's members fall. These members believe there are some "waters of the United States" on their property and they want to proceed by avoiding those areas. Thus, they need to know where the CWA does not apply so that they can proceed in those areas without a permit—which they have a right to do[18]. Clearly, for these landowners jurisdictional determinations affect their rights.

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[18] Additionally, it is also not an "adequate remedy" to force these landowners to obtain a permit that they do not desire just so they can obtain judicial review. *See* 5 U.S.C. § 704.

## CONCLUSION

The Petitioner attempts to constrain APA judicial review, and fails to adequately address its regulations and guidance documents, which both recognize that approved jurisdictional determinations satisfy the final agency action test the Court established in *Bennett*. Furthermore, the Petitioner views approved jurisdictional determinations myopically by not considering all of the rights impacted, obligations affected, and legal consequences that flow from approved jurisdictional determinations. For these reasons, the Court must affirm the decision below and hold that approved jurisdictional determinations are subject to APA judicial review.

DATED: March 2, 2016

Respectfully submitted,

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# APPENDIX

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## APPENDIX A
## 1a
## PROPERTY DISCLOSURE DOCUMENT FOR RESIDENTIAL REAL ESTATE

**Answer all questions to the best of your knowledge. Explain any "yes" answers fully at the end of each section.**

Y = Yes N = No NK = No Knowledge

### SECTION 1: LAND

(1) Lot size or acres _____

(2) Are there any servitudes/encroachments regarding the property, other than typical/customary utility servitudes, that would affect the use of the property? ☐ Y ☐ N ☐ NK

(3) Are there any rights vested in others? Check all that apply and explain at the end of this section.

| | | | |
|---|---|---|---|
| Timber rights | ☐ Y | ☐ N | ☐ NK |
| Common driveway | ☐ Y | ☐ N | ☐ NK |
| Right of ingress or egress | ☐ Y | ☐ N | ☐ NK |
| Mineral rights | ☐ Y | ☐ N | ☐ NK |
| Right of way | ☐ Y | ☐ N | ☐ NK |
| Surface rights | ☐ Y | ☐ N | ☐ NK |
| Right of access | ☐ Y | ☐ N | ☐ NK |
| Air rights | ☐ Y | ☐ N | ☐ NK |
| Servitude of passage | ☐ Y | ☐ N | ☐ NK |
| Usufruct | ☐ Y | ☐ N | ☐ NK |
| Servitude of drainage | ☐ Y | ☐ N | ☐ NK |
| Other _____ | ☐ Y | ☐ N | ☐ NK |

(4) Has any part of the property been determined a wetland by the United States Army Corps of Engineers under §404 of the Clean Water Act?

☐ Y ☐ N ☐ NK

(a) Is such a determination pending?

☐ Y ☐ N ☐ NK

(b) What date was determination made? _____

The Clean Water Act is a federal law that protects the wetlands of the United States. Section 404 of the Act contains permit requirements for altering or building on property that has been determined a wetland by the Army Corps of Engineers. The Corps may assess a fee to the **SELLER** or **PURCHASER** of a property for this determination. A property that has been determined a wetland may result in additional costs for a Section 404 permit. Documentation is attached and becomes a part of this property disclosure if the property described herein has been determined a wetland by the Corps.

(5) Has any flooding, water intrusion, accumulation, or drainage problem been experienced with respect to the land? If yes, indicate the nature and frequency of the defect at the end of this section.

☐ Y ☐ N ☐ NK

(6) What is/are the flood zone classification(s) of the property? _____

(a) What is the source and date of this information?
Check all that apply. ☐ Survey/Date _____
☐ Flood Elevation
☐ Certificate/Date _____
☐ Other/Date _____

| Question Number | Explanation of "Yes" answers |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

☐ Additional sheet is attached

## SECTION 2: TERMITS, WOOD-DESTROYING INSECTS AND ORGANISMS

(7) Has the property ever had termites or other wood-destroying insects or organisms?
☐ Y ☐ N ☐ NK

(8) Was there any damage to the property?
☐ Y ☐ N ☐ NK

(9) Was the damage repaired?
☐ Y ☐ N ☐ NK

(10) Is the property currently under a termite contract? ☐ Y ☐ N ☐ NK

(a) Name of company _____

(b) Date contract expires _____

(c) List any structures not covered by contract _____

* * *

**APPENDIX B**

4a

**DEPARTMENT OF THE ARMY**

St. Paul District, Corps of Engineers
180 Fifth Street East, Suite 700
St. Paul MN 55101-1678

Reply to attention of
Operations Regulatory
(2007-1914-DJS)

**FEB 07 2012**

Mr. Kevin Pierce
Hawkes Peat Company, Inc.
P.O. Box 14111
Grand Forks, North Dakota 58208

Dear Mr. Pierce:

This is in response to your request that the Corps of Engineers provide an Approved Jurisdictional Determination on the 520- acre property (Mercil Site), now owned by Hawkes Peat Company, Inc. The project site is located in Sec. 13, T. 157N., R. 44W., Marshall County, Minnesota.

This letter contains an approved jurisdictional determination for your subject site. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR Part 331. Enclosed you will find a Notification of Appeal Process (NAP) fact sheet and Request for Appeal (RFA) form. If you request to appeal this determination, you must submit a completed RFA form to the Mississippi Valley Division Office at the following address:

Administrative Appeals Review Officer
Mississippi Valley Division
P.O. Box 80 (1400 Walnut Street)
Vicksburg, MS 39181-0080
(601) 634-5821
(601) 634-5816 (fax)

In order for an RFA to be accepted by the Corps, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP Should you decide to submit an RFA form, it must be received at the above address by

It is not necessary to submit an RFA form to the division office if you do not object to the determination in this letter

Please be aware that this determination **does not** specifically identify the limits of our jurisdiction on the Mercil Site. The attached Approved Jurisdictional Determination confirms that there are wetlands present and that they are waters of the U.S. and are subject to our jurisdiction under section 404 of the Clean Water Act (CWA). In this case, the limits of Federal jurisdiction would be established with a wetland delineation. As you are aware, my staff has

**EXHIBIT**
**6**

* * *